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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LYNN ELLIOT, Plaintiff and Appellant, v. SOUTHERN CALIFORNIA GAS COMPANY, Defendant and Respondent.	B213652 (Los Angeles County Super. Ct. No. BC373940)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed.

The Myers Law Group, David P. Myers, D. Smith and Ann Hendrix Plaintiff and Appellant.

Bate, Peterson, Deacon, Zinn & Young, Linda Van Winkle Deacon and Nima Shivaya for Defendant and Respondent, Southern California Gas Company.

In this suit brought pursuant to the California Fair Employment and Housing Act (Govt. Code, § 12900 et seq., the FEHA)[1] plaintiff Lynn Elliot (plaintiff) appeals from a summary judgment granted to defendant Southern California Gas Company (defendant). Plaintiff contends there are triable issues of material fact in this case, and she contends the trial court misapplied California law regarding FEHA causes of action for discrimination, retaliation, failure to engage in dialogue regarding work accommodation, and failure to accommodate in the workplace. Specifically, she asserts the overriding issue is whether defendant violated the FEHA when it limited her use of accrued paid time-off benefits in response to her request for a disability accommodation.

We find defendant did not violate the FEHA in its response to plaintiff's request for a work accommodation of her disability. The summary judgment will therefore be affirmed.

BACKGROUND OF THE CASE

1. *The Complaint*

Plaintiff's complaint, which was filed on July 6, 2007, alleges all of the following. Plaintiff has been employed by defendant for over 20 years.[2] She was diagnosed with throat cancer in May 2006 and left her employment position on medical

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[1] Unless otherwise indicated, all references herein to statutes are to the Government Code.

[2] Plaintiff stated in her declaration filed in support of her opposition to the motion for summary judgment that since May 2001 she has been working at defendant's San Dimas call center as a customer service representative IV.

leave to receive treatment, returning to work full time on February 21, 2007. On March 2, 2007, she submitted a letter from her physician to request the work accommodation that she be permitted to continue working full time but with a restriction that she speak on the telephone no more than four hours each day. Defendant informed plaintiff the request could not be accommodated and it returned her to medical leave from March 16 to May 16, 2007. Defendant told her she could not return to work without submitting to a "fitness for duty" examination. After communications between plaintiff's and defendant's attorneys, she was permitted to return to work. However she was informed that because she had returned to work pursuant to a reasonable accommodation request, she was not eligible for benefits for which an employee with her years of employment would usually be eligible, including but not limited to sick pay, vacation pay and holiday pay. She was also informed that if she missed more than 32 hours of work during a three-month period she would be placed on leave without pay. Plaintiff filed a complaint on June 21, 2007 with the California Department of Fair Employment Housing, was sent a right to sue letter four days later, and plaintiff has exhausted her administrative remedies.

In her first cause of action (violation of the FEHA by discrimination on the basis of disability), plaintiff alleged she is an employee covered by section 12940 et seq. which prohibits discrimination in employment on the basis of disability, and defendant is an employer within the meaning of section 12926, subdivision (d) and is barred from discriminating in its employment decisions on the basis of disability. Plaintiff alleged defendant denied her benefits and took other actions, all of which were motivated by

plaintiff's disability, and such practices proximately caused plaintiff to sustain losses in earnings and other employment benefits, suffer humiliation, emotional distress, and mental pain and anguish, and incur attorney's fees and costs, and when defendant was engaging in its unlawful actions it acted with oppression, fraud, malice and in conscious disregard of plaintiff's rights, and plaintiff is entitled damages, including punitive damages.

Plaintiff's second cause of action (retaliation) alleges she engaged in legally protected activities when she requested time off to accommodate her disability and a reasonable accommodation that would allow her to return to work, but defendant attempted to refuse the reasonable accommodation requested by plaintiff's physician, refused to provide plaintiff with holiday, vacation and sick pay, and placed her on mandatory leave despite her request for reasonable accommodation which would have allowed her to return to work, all of which caused plaintiff to sustain damages as set forth in her first cause of action.

The third cause of action (failure to accommodate a disability) alleges defendant engaged in unlawful activity by failing to make a reasonable accommodation that she requested for her physical disability so that she could return to work, and instead defendant attempted to place her on medical leave until she could return to work without requiring the accommodation, and then after granting the accommodation defendant denied plaintiff employment benefits, thereby causing plaintiff to sustain the abovementioned damages.

Plaintiff's fourth cause of action (failure to engage in an interactive process to determine reasonable accommodation) alleges defendant failed to timely and in good faith engage in the interactive process regarding reasonable accommodation that is required by the FEHA and plaintiff suffered the abovementioned damages.

2. *Defendant's Responses*

Defendant filed a general denial with affirmative defenses on August 9, 2007, and the following day removed the case to a federal district court, asserting the case "involves a claim for clarification of rights under an employee benefit plan and a collective bargaining agreement and, as such, it is completely pre-empted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq., as amended ("ERISA") and Section 301 of the Labor Management Relations Act ("LMRA") (29 U.S.C. § 185)." By order dated November 9, 2007, the district court remanded the case to state court, finding no preemption under either of the federal Acts.[3]

On June 26, 2008, defendant filed its motion for summary judgment, or in the alternative, summary adjudication of issues. Plaintiff's opposition and defendants reply followed, and on September 15, 2008 the motion was submitted after the court heard arguments on it. On September 23, 2008, the court issued a five-page "order on

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[3] Federal preemption was an issue in the summary judgment motion and is an issue in this appeal. The trial court, in its order granting the summary judgment motion, stated that the provisions regarding disability leave in the collective bargaining agreement under which plaintiff works are within ERISA. However, that was the court's only acknowledgement of the preemption matter.

The summary judgment granted to defendant complies with the FEHA. We decline to address the preemption issue in this appeal.

submitted motion" whereby it stated its analysis of the motion and its conclusion that defendant is entitled to summary judgment. By minute order dated October 6, 2008 the motion was granted. A judgment was signed and filed on October 29, 2008, and a minute order dated November 4, 2008 states that a motion filed by plaintiff for reconsideration of the court's October 6, 2008 ruling was denied. Thereafter, plaintiff filed this timely appeal.

3. *Evidence Presented to the Trial Court*[4]

a. *Plaintiff's Work History Prior to Her Diagnosis of Cancer*

Plaintiff began working for defendant as a full time employee in July 1982. She is a member of a union and since she began her employment with defendant she has always been covered by a collective bargaining agreement between defendant and the union (the CBA).[5]

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[4] In support of its motion for summary judgment, defendant submitted the declaration of John Garcia who is defendant's Disability Management Services Rehabilitation Adviser (Garcia), together with exhibits to the declaration. Garcia has held that position since February 2003. Defendant also presented portions of plaintiff's deposition testimony. Plaintiff submitted her own declaration, and also the order of the federal district court remanding the case back to state court. In this opinion we have not set out the portions of plaintiff's declaration to which the trial court properly sustained objections.

[5] One of the exhibits to Garcia's declaration (exhibit "A"), is portions of a document entitled "Agreement Between [defendant] & Utility Workers Union of America, AFL-CIO International Chemical Workers Union Council, UFCW, AFL-CIO January 1, 2005 Respecting Rates of Pay and Other Conditions of Employment." He identifies exhibit A as the parties' CBA.

Plaintiff has worked for defendant as a customer service representative since May 2001. Asked at her deposition what that position entails, plaintiff stated she "[s]pends eight hours a day on the telephone talking to [defendant's] customers."

b. *Conflicting Medical Opinions Regarding Plaintiff's Disability*

Plaintiff was diagnosed with throat cancer on May 2, 2006. Garcia states in his declaration that the following month plaintiff went on medical disability leave under the terms of the CBA's long term disability (LTD) plan.[6] Thereafter, defendant's disability management services sent an "employee disability report" form to Timothy Byun, M.D., plaintiff's oncologist, asking that the doctor fill out the form. On the report, which he dated December 8, 2006, Dr. Byun stated plaintiff had been under his care since May 16, 2006 for head/neck cancer, her prognosis was guarded, she received chemotherapy and radiation, surgery was planned, and she was prescribed medications. The doctor also stated plaintiff would be able to perform her customary job duties on December 1, 2007, and the doctor stated by way of explanation that plaintiff was "unable to talk very long due to dry mouth/sore throat." Dr. Byun added that plaintiff could return to work on December 8, 2006 with the temporary restriction that she

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[6] Plaintiff disputes that the LTD is part of the CBA and she asserts defendant has offered no proof that it is. However, Garcia states in his declaration that the CBA provides disability benefits that were negotiated "in the Pension and Benefit Agreement, Appendix D to the CBA." Exhibit A to Garcia's declaration includes portions of a document entitled "Appendix D Pension and Benefit Agreement Between [defendant] and [the two unions that are parties to the CBA]." The trial court found it "absolutely clear" that the provisions governing disability eligibility and payments "are benefits governed by the CBA and the compensation received by plaintiff during her absence from work for medical reasons was paid "pursuant to that agreement."

perform a "non-talking job." He added: "She's unable to talk more than 5 minutes due to sore throat and dry mouth from chemotherapy & radiation therapy."

Some 10 weeks later, plaintiff obtained a far different medical opinion. On February 20, 2007, plaintiff's doctor, Han Kim, M.D., a radiation oncologist, gave plaintiff a note stating she could return to work. No work restrictions were stated in that doctor's note. Plaintiff returned to her full time regular duties the next day.

However, just over a week later, plaintiff presented defendant with a note from her family doctor, Daniel L. May, M.D., whom she had gone to see because of a fungus infection in her mouth that resulted from her cancer treatments. Dr May stated that "due to illness," plaintiff could not speak on the phone "or with people more than 4 hours daily." The note is dated March 2, 2007. Based on plaintiff's own deposition testimony of her job description (that her job requires her to spend eight hours a day speaking on the telephone), Dr. May's note was a statement that she was not permitted by him to attend to her job duties in her usual manner. *The note from Dr. May does not provide an opinion whether plaintiff could work full time if she refrained from having speaking duties for more than four hours a day.*

Thus, by March 2, 2007, plaintiff had three different work directives from her three doctors.

c. *Plaintiff Returns to Full Time Disability Status and Is Eligible for an Internal Employment Plan*

Garcia states in his declaration that after plaintiff submitted Dr. May's March 2, 2007 note, she was placed back on LTD pursuant to the parties' CBA and the disability

plan that was negotiated as part of the CBA. This was done because plaintiff had not been back to work for 180 days and her need to reduce her telephone time was related to her cancer disability. She began receiving the same LTD benefits she had been receiving prior to her return to work on February 21, 2007, including paid time off.

According to Garcia, in addition to continued LTD benefits plaintiff was also eligible to have an internal employment plan (IEP) "provided for in the CBA" because she had been on LTD and could not return to her job full time. He states that the IEP (which is also known as a work hardening plan, return to work plan, and transitional work plan) is designed to give an employee who is recovering from an illness or injury the opportunity to gradually increase her work tolerance *and at the same time remain on disability status*. Included with Garcia's exhibit A to his declaration are pages from a booklet explaining the disability program of "the Company." A portion of the booklet states: "If you have been approved to return to your regular job at the Company with temporary restrictions (such as reduced work hours), you can continue to receive disability benefits for up to six months while performing your regular work. Your disability benefits will be reduced by your employment earnings based on a 40-hour workweek." Garcia states that because the employee in an IEP remains on LTD, she continues to be eligible for 40 hours of LTD pay each week, offset, hour for hour, by the pay she makes working for defendant.[7]

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[7] Plaintiff argues that defendant "has offered no evidence that either the IEP . . . or anything else about this case is contained in the CBA [and t] he obvious explanation for this vacuum of evidence is because it does not exist." The problem with plaintiff's argument is that, as noted in footnote 6, Garcia states in his declaration that the pages in

After plaintiff submitted Dr. May's March 2, 2007 note limiting her to a maximum of four hours of "speaking" work per day, defendant devised an IEP for plaintiff whereby she would work four hours a day speaking on the phone and build up one hour each month until she could spend eight hours on the phone. The remaining hours in each work day would continue to be paid by LTD.

Defendant then sent a letter to plaintiff's oncologist, Dr. Byun, asking his opinion about the proposed gradual return to full time employment. The letter is dated March 9, 2007. Thus within *one week* of receiving Dr. May's March 2, 2007 note, defendant had devised an IEP for plaintiff and had sent off a letter seeking the opinion of plaintiff's oncologist regarding the proposed IEP. In the letter to Dr. Byun, defendant noted that the doctor had previously reported plaintiff could return to work in a modified capacity, and defendant asked the doctor for "assistance in coordinating a feasible return-to-work plan." The letter states that only employees of defendant "who are expected to make a full recovery within 6 months from start of return to work

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his exhibit A are portions of the CBA. It was plaintiff's burden to present evidence disputing Garcia's statement.

According to Garcia, the terms and conditions placed on plaintiff's IEP (including the conditions of which she complains), are part and parcel of the understanding between defendant and the unions regarding how an IEP operates, and are a customary part of IEP's. He states that administration of IEP's has always been the same. Therefore, the fact that the terms and conditions imposed on plaintiff's IEP may not be written into the contract between defendant and the unions is not determinative of their validity. Parties who chose to operate under a contract in a specific manner effectively agree that such manner is part of the contract. There is no evidence that plaintiff's union has ever disputed the restrictions in plaintiff's IEP, including the ones of which plaintiff complains in this action—her inability to use her accumulated sick leave, personal leave and vacation, and a 32-hour restriction on the amount of sick time she could take in a three-month period while working under her IEP.

program are eligible to participate" in the return-to-work program. (Emphasis deleted.) The doctor was asked to complete an "attached form" and return it to defendant, which Dr. Byun did. On the form defendant set out the proposed IEP for plaintiff, explaining that the first four weeks she would spend four hours a day in "full work activity" and an hour would be added to her work day every four weeks until at week 17 she would be released to full duty with no limitations. In his reply, the doctor stated plaintiff has temporary work restrictions and explained: "dry mouth & sore throat due to radiation therapy." He stated the restrictions are in effect from March 2006 to *September 2007*, and added that his estimated date that plaintiff could return to full duty was "*9/1/07 (maybe)*." (Italics added.) Asked on the form if, in his professional opinion, plaintiff was ready to return to work and would benefit from the gradual return to full duty," *Dr. Byun stated he did not approve of such a plan*. He signed the form on March 12, 2007.

d. *Defendant Seeks a Definitive Evaluation of Plaintiff's Condition*

Plaintiff "fired" Dr. Byun as her oncologist. She considered Dr. May her primary care physician. She testified at her deposition that after she was put back on LTD she "spent the next two or three months arguing with Sandra Cordero and/or John Garcia as to who was going to be able to write a release and evaluate my condition as far as fitness to return to work." Plaintiff states in her declaration that when she gave defendant the March 2, 2007 note from Dr. May she was "placed out on leave from March 16, 2007, through May 16, 2007, as a result of [defendant] stating that [it] could not accommodate [her] in the manner [her] physician wanted. The company further

stated that the only way they would bring me back was if I submitted to a fitness for duty exam."

Dr. May provided plaintiff with a note dated April 26, 2007, wherein he stated: "Lynn may work 8 hours daily now—however she may not do customer service or phone work (requiring lots of talking) more than 4 hours daily. She may increase the time talking by 1 hour/day each month so that after 4 months she can speak full time." Plaintiff stated in her declaration that pursuant to that April 26, 2007 note from Dr. May, she was allowed to return to work according to the doctor's directive without the fitness exam.

Garcia states in his declaration that between March 12 and April 26, 2007, (the dates of Drs. Byun and May's respective second notes to defendant), defendant "attempted to obtain a clear and proper medical release for [plaintiff] to return to work."[8] Because plaintiff's reaction to Dr. Byun's opinion on the form he filled out was to stop seeing him, and because Byun had been her oncologist and Dr. May is plaintiff's family doctor and not an oncologist, defendant asked plaintiff for an oncologist release but plaintiff said she did not have an oncologist. Although defendant offered to select an oncologist to evaluate plaintiff at defendant's expense, plaintiff stated she would not

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[8] The CBA provides that defendant "reserves the right to verify the disability of any employee through its own medical staff or by requiring a doctor's certificate in connection with the payment of Sickness Allowance or Disability Benefits." Both the abovementioned appendix D (the Pension and Benefit Agreement between defendant and plaintiff's union), and a disability benefit plan brochure provide that an employee who is cleared to return to his or her former position with restrictions, such as reduced work hours, will be entitled to receive disability benefits for up to six months, with the benefits reduced hour for each hour of employment earnings.

accept the oncologist's opinion if it differed from Dr. May's. Because of plaintiff's stance, defendant "felt it had no choice but to accept Dr. May's non-specialist evaluation."

At the oral argument on defendant's motion for summary judgment, plaintiff's attorney indicated his agreement with defendant's counsel's presentation to the court that when defendant was presented with conflicting opinions from plaintiff's doctors there was a question regarding what accommodation for plaintiff in the workplace would be appropriate. Plaintiff's attorney stipulated that at that point in time "the company was engaging in the process."

e. *An Alternative IEP Is Made for Plaintiff*

Garcia states in his declaration that in addition to the four hours of telephone work Dr. May allowed for her, plaintiff wanted to have four additional hours of actual work rather than have four hours of LTD pay to make up an eight hour work day, and so an alternative IEP needed to be created for plaintiff. By the middle of May 2007 plaintiff and defendant had agreed on the terms of an IEP and it was approved by Dr. May. Defendant provided plaintiff with overflow clerical work in a department that handles customer correspondence. Garcia states that as a matter of course neither the customer correspondence department nor plaintiff's regular department (customer service telephone work) has part-time positions without requiring the employee to give up benefits; however, both of the part-time assignments that plaintiff had during her IEP were created just for her IEP because she continued to have LTD coverage. Also, although the correspondence work is grade three and her regular department is grade

four, plaintiff was paid at grade four rate for all work she performed under the IEP, and she was paid at an LTD rate of 60% of grade four for all of her missed time during the run of her IEP.[9]

Garcia states he spoke to plaintiff on the phone on May 15, 2007, and explained the terms and conditions of the IEP to her. Plaintiff states that when she spoke with Garcia he told her that if she used her sick leave she would be returned to LTD and if she were to be absent from work more than 32 hours for sickness during her IEP she would also be returned to LTD,[10]but he did not mention anything about using her vacation or personal business time. Garcia also sent plaintiff a letter dated May 16, 2007, welcoming her to the IEP, and noting its terms and conditions. Specifically, the letter states that in the IEP plaintiff would continue to be on a disability status but would work in an environment whereby her tolerance for her job would gradually increase. She would receive disability benefits, for up to six months. She would receive 100% pay for the hours she worked, and her disability benefits would be reduced hour for hour for each hour she worked, all based on the assumption that disability benefits are paid

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[9] Plaintiff states in her declaration that when she began working in the customer correspondence department under her IEP the supervisor there informed her that she was "thrilled" to have plaintiff there because the department has a lot of work. Much of the work provided to plaintiff in that department was at least two months old, there was work coming to that department the entire time she was there, and it has been plaintiff's experience that when there is not enough work in her regular department (customer service), the customer service employees (including those who are working without a reasonable accommodation) are routinely sent to the customer correspondence department as part of defendant's work load backup procedure.

[10] There is apparently a distinction between regular sick leave that an employee accumulates and the 32 hours of sick time an employee on an IEP is permitted to have.

on a 40-hour week. The hours she did not actually work in an eight hour day would be paid at the LTD rate. Under the IEP no vacation hours, sick time or other absences are paid except for company paid holidays. The letter also states that plaintiff's IEP program *may* terminate and she would be returned to only being on LTD for certain enumerated reasons, including that she would be absent from work for any reason for more than 32 hours in a three-month period, or that she would fail to maintain scheduled visits with her treating physician and/or physical therapist. The letter suggests that such visits be scheduled during off work hours "unless unusual circumstances prevail." According to Garcia all of these conditions that were explained to plaintiff "had been part of IEP since it was first included in the CBA." He states that plaintiff participated in an IEP in 1995 after surgery to her shoulder, and the conditions in plaintiff's 2007 IEP regarding vacation and personal leave, sick pay and the 32-hour absence restriction were also in effect in 1995. Plaintiff acknowledged at her deposition that she had participated in the IEP after shoulder surgery.

f. *Plaintiff's Discontent with Certain IEP Conditions*

Plaintiff states in her declaration that it was on the day she returned to work (May 16, 2007), that Garcia told her that because she was returning to work under a reasonable accommodation (permitting her to work full time but limiting her telephone time work), she was not entitled to benefits that an employee with her years of service had, including sick pay, vacation pay, personal business time and holiday pay. She states he also told her that if she missed more than 32 hours of work during

a three-month period she would be unilaterally placed back on leave.[11] She stated that Garcia had "conveniently glossed over" the conditions of her IEP until she received his letter welcoming her to the IEP. She did not file a grievance with her union regarding how the IEP was administered or what she was able to obtain through the program because the union did not want to pursue it.

Plaintiff sent an email to Garcia indicating her concerns about her IEP and Garcia replied by email dated May 22, 2007. Garcia observed that although plaintiff was expressing concerns about her limited time off during the IEP, he did not recall that she had perceived that to be a problem when they had previously discussed the IEP on the phone. Garcia explained that limited time off would further the purpose of the IEP,

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[11] Plaintiff's assertion that Garcia told her she would be unilaterally placed back on disability leave if she missed more than 32 hours of work during a three-month period conflicts with what plaintiff testified to at her deposition. Asked about the portion of Garcia's May 16, 2007 letter to plaintiff wherein he advised her that her IEP program "may" terminate if, among other things, she would be absent from work for more than 32 hours in a three-month period, plaintiff testified that no one ever explained to her what "may" terminate meant. Rather, she "assume[d] it meant if I hit more than 32 hours, it would be mandatory that I would be put back -- that I would be terminated. I didn't think it was discretionary. I figured it was just that's how it happened, it was automatic, not discretionary with HR or my supervisor." She stated she never asked anyone about it, including whether she would be dropped from her IEP if she had a biopsy. Plaintiff stated that the biopsy would entail a recovery of two weeks or at least one week. Asked at another point in her deposition if she ever asked Garcia about the letter's use of the word "may," plaintiff answered: "No. From the letter I got that's dated May 16, I thought it was pretty cut and dried and clear. I didn't think there was any wiggle room, so to speak."

One condition of the IEP was that plaintiff keep her medical appointments. She stated at her deposition that she eventually had a biopsy and endoscopy (in September2007) that her doctor had prescribed earlier but she only had it because she thought she was going to be covered by her sick leave. She thought she was "past the [IEP]" and she assumed she "would have benefits, [but] . . . after the surgery [she] found out that no, [she] wasn't going to get sick pay." The procedures were covered under LTD.

which is to build up her strength and endurance for her job. He observed that her next appointment with Dr. May would require her to miss approximately 2 hours of work and so she would have 30 hours left and "[h]opefully this will be ample time for you to get the medical attention you need." Garcia observed in his email to plaintiff that one of the defendant's concerns "from the beginning was the conflicting medical opinion in regard to your readiness to return to work. If you require extensive medical care exceeding the allowed 32 hours, perhaps it is premature for your return to work attempt at this time." Garcia added that if plaintiff's IEP ended in September as planned, she would have "ample time" to take her accrued vacation and personal business hours "without losing any of your entitlements."

Plaintiff states that from May through September 2007 she was prevented from using vacation, personal business time off and holiday pay in the same manner that she had used those benefits for the previous 20 years and in the same manner that a person who was not requesting a reasonable accommodation would have been able to do so. It had been her practice to have Friday's off during the summer so that she would have three-day weekends rather than take extended vacations because she cannot afford to actually take vacations. She acknowledged she did not have to forfeit any vacation time in 2007 because of the IEP because she was able to use up the vacation hours she had that could not be carried over to 2008.

Plaintiff felt that defendant had not engaged in an interactive process with her because of the way defendant set up her IEP and because she found out about the

conditions "after the fact." However, she stated she that "if [she] had known what [she] was stepping into, [she] probably would have had to accept it anyway."

g. *Plaintiff Refrains from Having Certain Medical Treatment*

Plaintiff states in her declaration that when she returned to work she noticed that her throat was extremely sore and it was like having strep throat every single day. She informed her supervisor that she needed a biopsy and that she could not take sick leave because of the 32-hour limit. She was not able to have the biopsy performed from May through September 2007 because she could not afford to return to LTD. At the time she returned to work in May 2007 she had already depleted her life savings as a result of being out on LTD for an extended period of time and if she returned to LTD she would not be able to pay for essential living items and make her mortgage payments.

At her deposition plaintiff testified that during the term of her IEP (approximately three and one-half months), she had root canal work done for which she took off work a total of 15 hours. She cancelled most of her doctor appointments because "32 hours would not be very hard to exceed." She cancelled a follow up appointment with Dr. May and she was not able to schedule a PET scan and a CT scan. She stated a CT scan takes 10 to 20 minutes, and a PET scan takes three to four hours but it is administered with the patient under "twilight anesthesia" and the patient is "in no condition to work the remainder of the day." She always tries to schedule medical appointments in the afternoon because her shift ends at 3:30 and "usually if [she] can get off at 2:30, [she] can handle it." Her throat became sore two weeks after she began working in the IEP but although her ear, nose and throat doctor wanted her to have

a biopsy and endoscopy she did not schedule them until the end of September 2007, after her IEP had ended. They took about five hours to complete. She took off work between 15 and 20 hours during her IEP and thus had 12 to 17 hours she did not use. She acknowledged that the unused time would have been sufficient to have had the PET scan and biopsy performed. However, as noted earlier, plaintiff represents that a throat biopsy requires at least one week and preferable two weeks recovery off work. She states the extended recovery period is due to the pain associated with talking.

Plaintiff stated at her deposition there was another reason why she did not have most medical appointments during her IEP, and that was because she "couldn't afford to get time off without pay." However, later in the deposition she acknowledged that she *was* paid for the time spent away from her normal eight hour IEP workday when she went to the medical appointments that were related to her throat cancer. She was paid by defendant under LTD rather than by her using her accumulated regular sick leave and thus was not receiving "full pay." She stated her dental appointments were also paid under LTD.

Garcia states in his declaration that during the time she was on the IEP plaintiff never asked him if she could schedule a biopsy or have more than 32 hours of sickness time and still remain working under the IEP. He states there have been instances where an IEP employee was permitted to have more than 32 hours off work.

h. *Plaintiff's IEP Was Successful*

Plaintiff acknowledged that having the IEP was a "big help" in terms of preparing her to work full time again; the graduated time helped her become stronger, and she stated there was no other work schedule that would have been better.

Garcia states that after plaintiff returned to work under the IEP on May 17, 2007, she gradually increased her time speaking on the telephone and decreased her clerical work until she was back to a regular eight hour work day of her pre-disability duties on September 7, 2007. Plaintiff did not forfeit any vacation, sick leave or personal business days as a result of participating in the IEP, and once she returned to the status of a regular employee she had all of the benefits of other regular employees that are provided in the CBA. Plaintiff's union has never filed a grievance over the administration of the IEP nor claimed that its implementation, including restrictions on taking vacation and personal time and restrictions on sickness pay/time violates the CBA.

4. *The Trial Court's Summary Judgment Analysis*

In its order on the submitted summary judgment motion the trial court stated it had reconsidered its tentative ruling based in part on three points that plaintiff's attorney clarified at oral argument. First, defendant's conduct that is the subject of this suit began on or about May 16, 2007, when Garcia sent plaintiff a letter in which he described the IEP on which plaintiff would be placed.[12]

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[12] We note that at oral argument, plaintiff's attorney stated that the FEHA was violated when plaintiff returned to work under the IEP in May 2007. Specifically

Second, the basis of the discrimination cause of action (and by extension, as the court observed, the basis of the other causes of action), is plaintiff's assertion that the IEP improperly required her attendance at work every day to build up her endurance for her duties, and as a result, plaintiff could not take a vacation day every Friday as she desired, and there were limitations on the amount of time off (including sick time) that she could take, such that taking extra time off could (but the court noted, not necessarily would) result in her being regarded as not ready to return to work and thus could result in her being returned to long-term disability status. The court observed that plaintiff claimed that the limitation on the amount of time off she could take prevented her from taking a day off work for a biopsy, and one to two additional weeks off to recover from the biopsy. The court observed that at her deposition plaintiff stated that when she had a biopsy and an endoscopy performed together in September 2007, she was at the medical facility from 8:00 a.m. to approximately 2:00 p.m. (which included her recovery from general anesthesia), and she did not mention at the deposition that the procedures also entailed a recovery period of one to two weeks; moreover, plaintiff presented no medical evidence that this additional recovery period would have been

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a violation occurred when she was informed that if she missed any more than 32 hours of work she would be on LTD with no IEP, and further informed that because she requested and received a reasonable accommodation for her disability she could not use vacation and other forms of paid time off/leave benefits. Her attorney stated plaintiff did not want to be on LTD because she wanted to be able to take Fridays off and take "all the terms and benefits that have been afforded to her that she has earned . . . under the [CBA]." He argued that the CBA does not say that if an employee requests a reasonable accommodation she will not be able to have vacation time and not be able to miss work more than 32 hours, and he asserted that those restrictions were made up by Garcia.

necessary, and she never discussed with Garcia the possibility of taking more than 32 sick hours off to have the biopsy done. Plaintiff did not find that the alternatives to the IEP (continued long-term disability without an IEP or working part time) were satisfactory because they entailed a reduced rate of compensation and she would not accumulate seniority or benefits.

Third, if the IEP proposed by defendant was entirely consistent with the collective bargaining agreement (CBA) under which the parties were operating, but the IEP does not meet what plaintiff believes are the requirements of the FEHA, then the terms of the CBA must be set aside.

The court stated that when it considered the undisputed evidence it was persuaded there was no discrimination, retaliation, or failure to accommodate or engage in the interactive process. It noted that the April 26, 2007 note from Dr. May wherein the doctor set out how many hours plaintiff could speak on the phone and suggested a monthly increase, was the very same work limitation adopted by defendant and thus defendant "fully accommodated [plaintiff's] needs in this regard. The court noted that it was "cognizant of the sequence of events with respect to differing evaluations of [plaintiff's] ability to return to work made at different times by her different doctors." The court also noted that while plaintiff's telephone work was a grade 4 position and the clerical work she did during the portion of the day she could not use the phone was only a grade 3 position, defendant compensated plaintiff at the grade 4 rate for all of her hours.

The court found that plaintiff's testimony established that the IEP defendant devised for her was successful in preparing her to work without restrictions and moved her to that result more quickly than if she had worked the four-day weeks that she wanted to work (that is, being able to take vacation days each Friday). The court further found that defendant fully accommodated plaintiff's desire to work full time at her regular pay while she was transitioning back to her regular eight hours of telephone work; plaintiff holds the same position she did prior to taking disability leave; after she completed the IEP her working conditions were the same as those in effect prior to her sick leave; and plaintiff's use of vacation days, sick leave and personal business days was only deferred during the IEP time and plaintiff did not forfeit any earned benefits.

The court stated the provisions regarding payments and eligibility for disability leave are governed by the CBA; plaintiff's compensation during her absence for medical reasons was pursuant to the CBA; the IEP fits within the CBA in that the excerpts of the agreements attached to Garcia's declaration as exhibit A mention inside employment and work hardening in the context of disability benefits, and although the excerpts do not contain an explanation of how work hardening may affect time off, Garcia's declaration is uncontroverted in asserting that plaintiff's union has never filed a grievance asserting that the restrictions that defendant imposes on time off for those employees in an IEP violate the CBA and therefore the IEP administered for plaintiff is consistent with the terms of the CBA as they relate to disability benefits.

The court concluded the IEP provided by defendant to plaintiff was both valid under the parties' CBA and valid under the FEHA. It stated that in this suit plaintiff

was arguing that she was legally entitled to work according to her own wishes and no concessions and inconveniences on her part were required; however, said the court, "[t]he conditions for disability benefits in the CBA do not require the employer [to] adopt [plaintiff's] position. Nor was defendant required as a matter of law to accept plaintiff's position, and the FEHA does not displace the CBA's provisions regarding disability benefits and make the IEP unlawful.

CONTENTIONS ON APPEAL

In addition to the evidentiary issues that we have already addressed in footnotes four and five through eight (the validity of the trial court's decisions on defendant's evidentiary objections and on the question whether defendant presented sufficient evidence of its LTD and IEP provisions), and in addition to the preemption issue which we have addressed in footnote three, plaintiff raises the question whether the trial court properly applied California law on the FEHA's provisions regarding medical disability, including discrimination, retaliation, failure to engage in a dialogue regarding reasonable accommodation, and failure to provide a reasonable accommodation. She asserts that imposing conditions on her IEP was unlawful in all four categories since the effect was that because she was working with an accommodation she was treated differently than defendant's employees who are not disabled.

Essentially plaintiff asserts that even though she could not do her job properly (that is, on a full time basis), and thus was not working in the same manner as defendant's employees in her job position who are not disabled and can do the job properly, she should be treated no differently than those employees. Except, of course,

that she also asserts she *should* be treated differently than those employees; that is, she should be given an accommodation which will permit her to do her job improperly and not lose pay. She asserts that is the law under the FEHA.

DISCUSSION

1. *Standard of Review*

We review the order granting defendant's motion for summary judgment on a de novo basis. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 474.) In doing so, we apply the same rules the trial court was required to apply in deciding the motion.

When the defendant is the moving party, it has the burden of demonstrating as a matter of law, with respect to each of the plaintiff's causes of action, that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849.)

If a defendant's presentation in its moving papers will support a finding in its favor on one or more elements of the cause of action or on a defense, the burden shifts to the plaintiff to present evidence showing that contrary to the defendant's presentation, a triable issue of material fact actually exists as to those elements or the defense. (§ 437c, subd. (p)(2).) That is, the plaintiff must present evidence that has the effect of disputing the evidence proffered by the defendant on some material fact. (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 849.) Thus, section 437c, subdivision (c), states that summary judgment is properly granted "if all the papers

submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Because a summary judgment denies the adversary party a trial, it should be granted with caution. (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 865.) Declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party. The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact. (*Id*. at pp. 865-866.) If, in deciding this appeal, we find there is no issue of material fact, we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court, or first addressed on appeal. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481.) If, on the other hand, we find that one or more triable issues of material fact exist, we must reverse the summary judgment.

2. *General Principles Applicable to Wrongful Discrimination Cases*

Section 12940, subdivision (a) makes it an unlawful employment practice for an employer to, among other things, discriminate against a person "in compensation or in terms, conditions, or privileges of employment" because of that person's physical disability. Because it is often difficult to produce direct evidence of an employer's discriminatory intent, certain rules regarding the allocation of the burdens and order of

presentation of proof have developed in order to achieve a fair determination of the question whether intentional discrimination motivated an employer's actions. (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254, fn. 8.)

At trial, the plaintiff must present a prima facie case of discrimination: she was a member of a protected class (such as a person with a disability); she was qualified for the position she sought or she was performing competently in the position she held; she suffered an adverse employment action (for example, she was terminated, demoted, or denied employment); and there is evidence that suggests the employer's motive for the adverse employment action was discriminatory. The plaintiff must present evidence of actions taken by the employer from which the trier of fact can infer, if the actions are not explained by the employer, that it is more likely than not that the employer took the actions based on a prohibited discriminatory criterion. If the plaintiff establishes a prima facie case of discrimination, a rebuttable presumption of discrimination arises and the burden shifts to the employer to rebut the presumption with evidence that its action was taken for a legitimate, nondiscriminatory reason, and if the employer does that, the presumption of discrimination disappears, and the plaintiff's task is to offer evidence that the justification presented by the employer is a pretext for discrimination or additional evidence of discriminatory motive. The burden of persuasion on the issue of discrimination remains with the plaintiff. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354-356.)

In *Hersant v. Department of Social Services* (1977) 57 Cal.App.4th 997, 1003-1005, the court stated that in employer-initiated summary judgment motions, an

employer's presentation of evidence showing a nondiscriminatory reason for an adverse employment action, coupled with the employee's presentation of a prima facie case of discrimination, will not result in the need for a trial on the issue of discrimination. Rather, the employee must present evidence to rebut the employer's claim of nondiscriminatory motivation, or the employer will prevail on its motion. "[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Id*. at pp. 1004-1005.) The employee must do more than raise an issue whether the employer's action was unfair, unsound, wrong or mistaken, because the overriding issue is whether discriminatory animus motivated the employer. (*Id*. at p. 1005.) " '[T]he [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for . . . [the asserted] non-discriminatory reasons." [Citations.]' [Citations.]" (*Ibid*.)

In both of these situations—trials and motions for summary judgment brought by an employer—the question whether an employer's action is "adverse," as that term is used with respect to the FEHA, is an inquiry that "requires a case-by-case determination based on objective evidence." (*Thomas v. Department of Corrections* (2000)

77 Cal.App.4th 507, 510-511.) The fact that an employee is not happy with an employer's act or omission or is inconvenienced by it does not equate with a materially adverse employment action. (*Id*. at p. 511.) The employment action must be both detrimental and substantial. (*Ibid*.) A court must "analyze . . . complaints of adverse employment action to determine if they result in a material change in terms of . . . employment, impair . . . employment in some cognizable manner, or show some other employment injury. . . ." (*Ibid*; accord, *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 386-387.)

Plaintiff's claim of discrimination is based on her inability, under the LTD's IEP that was set up for her, to take more than 32 hours of sick time away from her IEP work days. That is, she was not allowed to use the paid time off that she had accumulated as sick leave, vacation time, and personal leave time, and was only permitted to be away from her accommodated work schedule a total of 32 hours in three months for sickness, factoring in, as we must, Garcia's evidence that in the past some employees working under an IEP had been given permission to exceed 32 hours. That 32-hour limit is the adverse employment action of which she complains—specifically, her inability to take a vacation day on Friday's as she had been used to doing, and to have medical appointments, including a biopsy that she states would need a one to two week recovery period.

3. *Analysis of Plaintiff's Claim of Discrimination*

Part of a plaintiff's prima facie case of discrimination is to present evidence that she was qualified for the position she sought or she was performing competently in the

position she held. However, plaintiff was not a "qualified person" since she could not perform the duties of her regular job with or without an accommodation. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 255.) "By its terms, section 12940 makes it clear that drawing distinctions on the basis of physical or mental disability is not forbidden discrimination *in itself*. Rather, drawing these distinctions is prohibited *only if* the adverse employment action occurs because of a disability *and* the disability would not prevent the employee from performing the essential duties of the job, at least not without reasonable accommodation. Therefore, in order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation." (*Green v. State of California* (2007) 42 Cal.4th 254, 262.)

A reasonable accommodation is "a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." (*Nadaf-Rahrov v. Neiman Marcus Group, Inc*. (2008) 166 Cal.App.4th 952, 974.) Here, plaintiff cannot establish that she could perform her job with or without an accommodation. Her job involved speaking on the telephone during her whole work day; the essential duty of plaintiff's regular job was full time speaking on the telephone. She could not do that. The accommodation of having her do clerical work did not enable her to do that. She had to gradually build up to being able to speak during the whole work day. Moreover, the fact that sometimes people in her regular position were temporarily sent to do that clerical work does not support an inference that clerical work

was part of her regular job. The clerical work is a separate position; indeed it is paid at a lower rate. Plaintiff's attempt to present her *accommodation "position"* (working four hours at her regular job and four hours at the clerical job) as the relevant job by which her claim of discrimination should be judged is a contortion. We reject her contention that her accommodation position is " 'the employment position' at issue for purposes of disability discrimination."

There is also an alternative basis for finding that the evidence presented to the trial court does not require a trial on the cause of action for disability discrimination. Plaintiff argues that because she was a disabled employee operating under an accommodation, the restriction of her use of accrued paid leave was discrimination in terms and conditions of employment because employees who are not disabled and not working under an accommodation are not so restricted and therefore she should have been permitted the same working conditions as any regular full-time employee. Leaving aside the fact that plaintiff was not a regular employee since she was working under LTD (and its IEP), which has its own parameters not applicable to other employees (for example, any sick time she took while on the IEP was paid at LTD rate which is lower than her usual pay rate),[13] plaintiff's assertion of wrongful

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[13] In her reply brief, plaintiff cites to *Prilliman v. United Air Lines, Inc*. (1997) 53 Cal.App.4th 935, 951, fn.4 wherein the court stated that "[s]ection 7294.2, subdivision (a) of title 2 of the California Code of Regulations provides that 'It shall be unlawful to condition any employment decision regarding an applicant or employee with a disability upon the waiver of any fringe benefit.' " Because plaintiff was on LTD when the relevant events in this case occurred, her reliance on that footnote is not made clear in her brief. She does not explain how under the LTD program an employee makes use of her accrued vacation, sick leave and personal leave.

discrimination fails because (1) defendant presented a *nondiscriminatory* reason for placing the restriction on plaintiff's use of accumulated leave and limiting her to 32 hours of sick time per three-month period while she worked under her IEP and (2) plaintiff did not meet her summary judgment burden of offering substantial evidence that defendant's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence defendant acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.

Defendant presented evidence that the inability to use accumulated leave time and the 32-hour limit of sick time away from work are designed to keep the employee on the job and build up her ability to return to a full day's work by gradually increasing her stamina for work while at the same time remaining on disability status. The philosophy behind the 32-hour limit is that if the employee needs more than 32 hours away from work during her IEP then perhaps the employee is not really ready to begin building up her ability to return to her full time position and she should remain on LTD without an IEP. Plaintiff has not met her burden of presenting substantial evidence showing that this stated reason for the IEP restrictions was untrue or a pretext for discrimination based on disability, or showing that defendant acted with discriminatory animus when it was applied to her. Defendant has been offering its employees this same method of returning from a disability to their full time position at a gradual pace since at least 1995 when plaintiff participated in an IEP with the same terms and conditions that her more recent IEP had. Garcia stated that to his knowledge, those

terms and conditions have always applied to IEP's. The ability to use her accumulated sick, personal and vacation leave hours was limited to the duration of plaintiff's LTD and she was not required to forfeit any of that time.

The restrictions of which plaintiff complains are reasonably seen by defendant and plaintiff's union as fostering employment for people with disabilities, not as discriminating against them on account of the disability. Assuming for purposes of argument that had she asked Garcia, plaintiff would have been denied the very extended recovery period from the biopsy that ultimately she did not undergo while working in the IEP, that also would be in keeping with the philosophy of IEP's—one cannot gradually work up to full time work by interrupting the gradual buildup with a one-to-two week recovery period. Because the IEP is a part of the LTD program, if plaintiff believed that the biopsy was absolutely necessary, plaintiff was still in LTD and thus could have removed herself from the IEP and returned to straight LTD status to have the biopsy, albeit at a lower pay rate.

As noted above, an employee must do more than raise an issue whether the employer's action which forms the basis of her discrimination claim was unfair, unsound, wrong or mistaken, because the overriding issue is whether discriminatory animus motivated the employer. Plaintiff has not presented evidence from which a reasonable fact finder could rationally infer that defendant acted with discriminatory animus against plaintiff, a person with a disability.

5. *Plaintiff's Claims of Retaliation, Failure to Reasonably Accommodate and Failure to Engage In an Interactive Process*

a. *Retaliation*

Courts apply a three-step analysis for FEHA claims of retaliation. Did the plaintiff establish a prima facie case of retaliation; did the defendant present a legitimate, nonretaliatory reason for its acts of which the plaintiff complains; did the plaintiff demonstrate that defendant's asserted legitimate, nonretaliatory explanation for its acts is actually a pretext for what amounts to retaliation. (*Flait v. North American Watch Corp*. (1992) 3 Cal.App.4th 467, 475-476.) To present a prima facie case of retaliation, the plaintiff must show (1) she engaged in a protected activity, (2) thereafter she was subjected to an adverse employment action by the employer, and (3) there is a causal link between the protected activity and the employer's action. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69; Flait, supra, at p. 476.)

Plaintiff has not met her prima facie case. Plaintiff did ask for a reasonable accommodation based on her doctor's indication that her job duties could require no more than four hours of speaking but could include nonspeaking activities and could build up to full time speaking work. She was given that accommodation. Plaintiff wished to work a full eight hour day because the additional four hours would pay more than taking those four hours on at an LTD rate. She was given that accommodation by being placed for four additional hours each day in a clerical job with no speaking duties. Moreover, the additional four hours were paid at her customary rate even though they

customarily do not merit that rate. If employees in plaintiff's regular (phone answering) position are sometimes sent to the clerical job to help out with accumulated clerical work, that changes none of the analysis. Doing the clerical work is not part of plaintiff's regular job; answering telephones is. The clerical work is a separate position but plaintiff was permitted to do it on an accommodation basis for half of each work day, five days a week. Further, denial of her usual ability to take her accumulated time off and restricting her to 32 hours of sick time in a three-month period was a regular part of IEP conditions so that she would work full weeks and build up her work stamina. There is simply no retaliation shown. Defendant proceeded according to the terms of its agreement with plaintiff's union regarding LTD and IEP.

b. *Failure to Reasonably Accommodate; Failure to Engage In an Interactive Process*

Besides prohibiting employment discrimination and retaliation based on an employee's disability, the FEHA also provides the employee with causes of action based on her employer's failure to engage in a good faith and timely interactive dialogue with the employee to determine an effective accommodation for the employee's disability, and failure to make a reasonable accommodation. (§ 12940, subds. (n) & (m).) "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34, 54.) Reasonable accommodations include, among things, job restructuring, modified work schedules,

and reassignments to vacant positions. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 225.)

Given the evidence in this case, we find defendant met its summary judgment burden regarding these causes of action. An employer can prevail in a summary judgment motion if it establishes with undisputed evidence that it offered a reasonable accommodation. (*Jensen v. Wells Fargo Bank, supra,* 85 Cal.App.4th at p.263.) "Holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future. (*Ibid.*) Here, of course, defendant held plaintiff's customary job open for her and she eventually returned to it.

But defendant did more than keep plaintiff's job open for her. The evidence also shows that after plaintiff submitted Dr. May's March 2, 2007 note (the doctor's first note), which limited plaintiff to four hours of "speaking" work, defendant devised an IEP for her to work four hours at her regular job and add one hour per day each month until she built up to eight hours a day, and prior to that end day, the remaining hours in her work day would be paid by LTD. A problem arose when plaintiff's oncologist, Dr. Byun stated he did not approve of that plan and plaintiff stopped seeing Dr. Byun. Plaintiff testified at her deposition that thereafter the parties' dialogue was taken up with the question who would evaluate her condition and write a release regarding her fitness to work, and she stated in her declaration that defendant wanted her to submit to an examination to determine her fitness to return to work. Given that by March 2, 2007

plaintiff had three different work directives from her three different doctors, and that her oncologist did not approve of the IEP plan submitted to him, we cannot find a triable issue of material fact regarding whether defendant's desire to have a definitive answer (qualified medical opinion from an oncologist) to the question whether plaintiff was able to return to work is outside the scope of engaging in a dialogue to devise an accommodation.

In the end, defendant accommodated plaintiff's assertion that she would not accept any oncologist's opinion if it differed from Dr. May's April 26, 2007 directive; defendant simply accepted that directive. In Dr. May's April 26, 2007 note he gave his blessing to plaintiff working eight hours a day with only four of them being speaking duties and building up plaintiff's talking time by one hour each day, each month, until she was able to resume her job on a full eight hour a day basis. Defendant provided that very thing for plaintiff each day, all at plaintiff's customary hourly rate of pay. Plaintiff's own doctor deemed that a reasonable accommodation.

The possibility that plaintiff would not be granted a request to take more than 32 hours off during a three-month period is, as a matter of law, not a failure to accommodate. As stated above, it was in keeping with the philosophy of the IEP—employees staying at their job five days a week and increasing their time to build up stamina, with the need for more than 32 hours being viewed as an indication that the employee might not be ready for an IEP. Moreover, if plaintiff had been taken off her IEP because of her need to have a biopsy with its extended recovery period, she was still entitled to remain on LTD, although it would be at a lower rate of pay. Employers

are not required to provide the accommodation the employee wants or even the best accommodation, only a reasonable one. *Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th 215, 228.) Employers have discretion to choose an effective accommodation based on such things as cost and ease of providing the accommodation. (*Ibid*.) Here, both the defendant and plaintiff's own union chose plaintiff's IEP accommodation. They also chose an alternative reasonable accommodation—plaintiff could have stayed on LTD without engaging in an IEP. The FEHA does not require an employer to tailor accommodations to each employee's particular wishes.

In short, the dialogue between plaintiff and defendant included their conversations based on the various writings from plaintiff's doctors, and in the end an accommodation was made that mirrored the second one suggested by Dr. May.

DISPOSITION

The summary judgment is affirmed. Costs on appeal to defendant.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.